STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2012
v	No. 303721 Genesee Circuit Court
JOSEPHUS ATCHISON, Defendant-Appellant.	LC No. 10-027141-FC

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals his convictions for first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent terms of life imprisonment for each count of first-degree murder. We affirm, but remand for a correction of the judgment of sentence to reflect only one count of first-degree murder on two theories and one sentence for first-degree murder.

I. ADMISSION OF EVIDENCE

Defendant argues that the trial court erred in admitting expert testimony about the analysis of a presumed sample of the victim's DNA from blood on the victim's T-shirt. "[A] trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). An abuse of discretion occurs only when the trial court departs from the range of "reasonable and principled outcomes" or admits evidence inadmissible as a matter of law. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). If an evidentiary ruling involves a preliminary question of law, such as the interpretation of a rule of evidence or statute, the question of law is reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). In interpreting the rules of evidence we apply principles of statutory interpretation. *People v Caban*, 275 Mich App 419, 422; 738 NW2d 297 (2007). As such, this Court begins by examining the plain language of the rule. *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003). "If the language of the court rule is clear and unambiguous, then no further interpretation is required or allowed." *People v Buie*, 285 Mich App 401, 416; 775 NW2d 817 (2009).

Defendant contends the trial court should not have admitted the expert testimony because the prosecutor did not introduce the T-shirt into evidence. Relevant to defendant's argument, MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

From MRE 703, "[i]t necessarily follows that an expert witness may not base his or her testimony on facts that are not in evidence." *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008). Defendant's argument appears to suggest that the victim's T-shirt is either "facts or data" within the meaning of MRE 703. The rules of evidence do not define "facts or data;" accordingly, this Court may look to a dictionary to discern the generally accepted meaning of the terms. *People v Gursky*, 486 Mich 596, 608; 786 NW2d 579 (2010). As commonly used "fact" refers to "1. something that actually exists . . . 2. something known to exist or to have happened. 3. a truth known by actual experience or observation; something known to be true." *Random House Webster's College Dictionary* (1997). As commonly understood, "data" refers to "individual facts, statistics, or items of information." *Random House Webster's College Dictionary* (1997). Neither definition includes reference to anything physical, tangible, or concrete that would appear to require admission of the victim's actual T-shirt. See *Yost*, 278 Mich App at 390 (providing useful examples of "facts" required by MRE 703).

Here, the DNA experts based their opinions on the following: At the crime scene and during the autopsy the victim was clothed in a blood-soaked gray shirt. Later, Valerie Bowman, a forensic scientist, received a blood-soaked gray shirt from the Flint Police Department that came in a brown paper bag accompanied by a property record and delivered by a Sergeant Hosmer from the Flint Police Department. Bowman then cut a sample of the gray blood-soaked shirt and sent it for DNA analysis. The sample cut by Bowman was received by Dr. Julie Howenstine. From the sample, Dr. Howenstine created a DNA profile for use as a "presumed known sample" of the victim's DNA for comparison to the other blood evidence. These were the basic facts relating to the presumed sample underlying the DNA analysis conducted by Dr. Howenstine which formed the basis of her testimony. These facts were admitted into evidence as required by MRE 703, and the prosecutor's decision not to introduce the actual T-shirt did not violate any evidentiary rule.

Defendant also argues the court should not have admitted the DNA evidence because the prosecution failed to establish the proper chain of custody as a foundation for its admission. We disagree. We have previously recognized that "a break in the chain of custody is not a fatal flaw . . ." *People v Herndon*, 246 Mich App 371, 405; 633 NW2d 376 (2001). Instead, once the "proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims," the chain of custody goes to the weight of evidence rather than its admissibility. *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994).

Here, defendant correctly suggests that the chain of custody was imperfect for the T-shirt from which the presumed sample was drawn. In particular, the officer who delivered the T-shirt to Bowman did not testify. Nevertheless, there was a "reasonable degree of certainty" that the T-

shirt was the victim's shirt. In particular, the item in question was a gray, blood-soaked T-shirt observed on the victim's body at the crime scene and during autopsy. Bowman testified that she received the blood-soaked T-shirt from an officer of Flint Police Department, and it came with a duly documented property receipt. Moreover, the gray T-shirt was accompanied at each stage by a green shirt, also worn by the victim at the crime scene. The fact that the two shirts traveled together as evidence supports the prosecution's claim that the gray shirt was the one worn by the victim at the time of his death. In sum, we hold that the trial court did not abuse its discretion in finding a "reasonable degree of certainty" that the presumed sample was drawn from the T-shirt worn by the victim at the crime scene. *Id.* As such, the court properly admitted the DNA evidence and any doubts as to the chain of custody spoke to the weight of the evidence. *Id.*

Moreover, we note that defendant does not actually contend that the presumed sample was not in fact taken from the victim's T-shirt. He does not suggest that the T-shirt was "lost, misidentified, or tampered with." *Herndon*, 246 Mich App at 405. Indeed, the evidence supports the prosecution's contention that the presumed sample was drawn from the victim's T-shirt, and represents a sample of the victim's DNA. Specifically, Dr. Howenstine testified that it is to be expected that a person's own DNA will be the major contributor to their fingernail clippings. Here, the victim's fingernail clippings were analyzed and were a match to the presumed sample taken from the T-shirt. No foreign sources of DNA were found in the victim's fingernail clippings. Because defendant does not suggest anyone tampered with the T-shirt, and because the DNA from the T-shirt in fact matches the DNA in the victim's fingernail clippings, it would be groundless to suppose the presumed sample was not taken from the shirt worn by the victim at his death. We find no argument to suggest defendant was harmed by any break in the chain of custody. As such, the break in the chain of custody was not a "fatal flaw" and there is no evidentiary error requiring reversal. *Id.*

II. SUFFICIENCY OF THE EVIDENCE

Defendant claims this Court should reverse his felony murder conviction because the evidence was insufficient to support a finding of larceny. We review challenges to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When considering a claim of insufficient evidence, the "court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). "[A]ll reasonable inference must be drawn in favor of the prosecution." *People v Wolfe*, 440 Mich 508, 533; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

To convict defendant of felony murder, the prosecution was required to establish the following elements:

> (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the

> felonies specifically enumerated in [MCL 750.316]. [*People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).]

MCL 750.316(1)(b) provides a list of enumerated felonies, which includes "larceny of any kind." MCL 750.316(1)(b). The basic elements of larceny are:

> (1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner. [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999) (citation omitted).]

Defendant argues the prosecutor failed to prove a larceny because no evidence showed that anything was missing from the victim's person or home. While the prosecutor presented no direct evidence to establish money was missing from the victim, based on the evidence, a jury could have reasonably inferred the money was missing. Evidence supported the conclusion that the victim had money in his possession at the time of his death. The victim's half-brother testified that he gave the victim $150 the day before the murder. Defendant was present in the house when the victim received the money. Moreover, the victim's half-sister testified to speaking with the victim outside of a supermarket the day before he died. He told her that he had just been inside cashing his check and was waiting for a friend to give him a ride home. Her testimony was confirmed by the friend, who remembered taking the victim to the supermarket shortly before his death, and the store manager, who remembered the victim cashing an SSI check for over $500 right before the murder. The record also contains evidence to support the inference that defendant went to the victim's house with the intent to obtain money. Particularly, defendant was at a crack cocaine party that had run out of money for drugs. He was overheard talking about his intention to go get money so that he could get a room with Priscilla Davis, a woman he met at the party. He then left the party and went to the victim's house. Davis testified that she went to the victim's house and spoke to defendant through the door. She described his voice as "frantic," and rather than opening the door, he told her to "get away from the door." Forensic evidence placed defendant at the crime scene during the murder. Bowman testified that the blood splatter on defendant's shoes indicated that he was present during a bludgeoning event. Dr. Howenstine confirmed that blood on defendant's shoes was the victim's by testifying that there was a match on 13 of 13 alleles and a statistical frequency in the African-American population of 1 out of 110.7 quadrillion people. Testimony also showed that when defendant later returned to the party, he was suddenly in possession of money to spend on crack cocaine. Moreover, defendant tried to borrow $40 the previous day, so his sudden possession of money supported the inference that he stole from the victim before returning to the party. While no evidence directly establishes that money was missing from the victim's home, circumstantial evidence and reasonable inferences are sufficient to establish the elements of a crime, and all reasonable inferences must be drawn in the prosecution's favor. *Wilkens*, 267 Mich App at 738; *Wolfe*, 440 Mich at 533. From the evidence, a jury could reasonably have concluded that defendant left the party in search of money, he went to the victim's house, killed the victim, and returned to the party with money. From this, a jury could reasonably infer that the money with which defendant returned to the party was the victim's money. Accordingly, we hold that the prosecutor presented sufficient evidence to establish that defendant murdered the victim during the commission of a larceny.

III. DOUBLE JEOPARDY

Defendant contends that his rights against double jeopardy were violated because the judgment of sentence contains two counts of murder for a case involving only one victim. Double jeopardy protections in the federal and state constitutions prohibit multiple convictions and punishments for the same offense. *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008); US Const, Am V; Const 1963, art 1, § 15. We have previously recognized that "[m]ultiple murder convictions arising from the death of a single victim violate double jeopardy." *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000).

Here, it is uncontested, and the record clearly reflects, that there was only one victim. The jury convicted defendant on two theories of first-degree murder: premeditation and felony murder. However, defendant's judgment of sentence improperly lists two distinct counts of murder: first-degree premeditated homicide, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b). For each count, the judgment of sentence imposes a life sentence, and the sentences are to be served concurrently. This Court will uphold a single conviction based on two alternative theories. *People v Joezell Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005). However, in such a case, the judgment of sentence may not reflect two counts of murder or two sentences. *Id.*; *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). Double jeopardy protections entitle defendant to a judgment of sentence accurately reflecting only one count of murder supported by two theories and only one sentence. *Id.* Therefore, we remand for a correction of the judgment of sentence to reflect one count of first-degree murder based on two theories (premeditated murder and felony murder) and one sentence for first-degree murder.

Affirmed, but remanded for a correction of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello